

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

STARR INDEMNITY & LIABILITY
COMPANY, a/s/o Polaris, Inc.,

Plaintiff,

EXPEDITORS INTERNATIONAL OF
WASHINGTON, INC., a Washington
corporation, et al.,

Defendants.

CASE NO. 2:23-cv-00621-TL

ORDER ON MOTIONS TO DISMISS

This is an action for damages resulting from the derailment of a train carrying cargo from Seattle, Washington, to Wilmington, Ohio. This matter is before the Court on motions to dismiss by Defendant BNSF Railway Company (Dkt. No. 24) and Defendant Max Trans Logistics LLC (Dkt. No. 25). Having reviewed Plaintiff Starr Indemnity and Liability Company's responses (Dkt. Nos. 27, 33), Defendant BNSF's reply (Dkt. No. 30), and the relevant record, and finding oral argument unnecessary, *see* LCR 7(b)(4), the Court GRANTS the motions with leave to amend certain claims.

I. BACKGROUND

The allegations are stated as pleaded in the Amended Complaint, Dkt. No. 6.

A. The Parties

Plaintiff Starr Indemnity and Liability Company (“Starr Indemnity”) is a Texas corporation, with its principal place of business in New York City. Dkt. No. 6 ¶ 1.1. Plaintiff is subrogee of Polaris, Inc., a Minnesota corporation with its principal place of business in Medina, Minnesota. *Id.* ¶¶ 1.2, 3.13–3.14.

Defendant Expeditors International of Washington, Inc. (“Expeditors”), is a Washington corporation, with its principal place of business in Seattle, Washington. *Id.* ¶ 1.4.

Defendants Max Trans Logistics LLC and Max Trans Logistics of Chattanooga, LLC (collectively, “Max Trans”) are Tennessee companies with their principal place of business in Chattanooga, Tennessee. *Id.* ¶ 1.5.

Defendant Delta Trucking, Inc., is a Florida corporation with its principal place of business in Miami, Florida. *Id.* ¶ 1.6. Defendant Delta Logistics, Inc., is an Oregon company, with its principal place of business in Wilsonville, Oregon. *Id.* Delta Logistics also does business as foreign profit corporation Delta Logistics WA, Inc. out of Kent, Washington. *Id.* Collectively, these Defendants will be referred to as “Delta.”

Defendant Burlington Northern Santa Fe (“BNSF”) Railway Company is a Delaware corporation with its principal place of business in Fort Worth, Texas. *Id.* ¶ 1.7.

B. Factual Background

Polaris purchased outerwear (jackets and pants), shoes, and helmets (the “Subject Goods”) to be transported by sea from Vietnam, South Korea, and China, for ultimate delivery to customers in Ohio. *Id.* ¶ 3.1. Teton Outfitters LLC was the importer and consignee of the Subject Goods. *Id.* ¶ 3.2.

1 Defendant Expeditors was the non-vessel owning common carrier (“NVOCC”) which
2 issued two sea waybills (Nos. 65T0010179, 65T001173) dated January 3, 2022, for
3 transportation of the Subject Goods in four 40’ containers to be delivered to Seattle and Tacoma,
4 Washington. *Id.* ¶ 3.3. On various dates in March and early April of 2022, the Subject Goods
5 arrived in Seattle. *Id.* ¶ 3.4.

6 Defendant Expeditors was also the freight forwarder responsible for then transporting and
7 delivering the Subject Goods from Washington to Ohio. *Id.* Defendant Expeditors caused the
8 four containers of Subject Goods to be placed in a container yard in Sumner, Washington, and
9 consolidated into two cargo trailers. *Id.* ¶¶ 3.5–3.6. Defendant Expeditors also issued two
10 bookings (Nos. H030201566, H030201567) to transport the two trailers overland from
11 Washington to Ohio. *Id.* ¶ 3.6.

12 Defendant Expeditors agreed to transport the Subject Goods by motor truck and hired
13 Defendant Max Trans, a motor truck carrier, to pick up the Subject Goods and carry them from
14 Washington to Ohio. *Id.* ¶¶ 3.3, 3.7. Defendant Max Trans picked up the Subject Goods in
15 Seattle and took them to a container yard. *Id.*

16 Defendant Max Trans subcontracted some or all of the interstate motor truck carriage to
17 Delta. *Id.* In the container yard, and based upon their position in the yard, Defendant Max Trans
18 and/or Defendant Delta “erroneously believed” that the Subject Goods were scheduled for travel
19 by rail to Ohio. *Id.* One or both Defendants took the Subject Goods to Defendant BNSF’s rail
20 yard, where they were loaded in a trailer on flat car (“TOFC”) configuration. *Id.* ¶ 3.8. However,
21 the shipper had specifically requested, and Defendant Expeditors had agreed, that the Subject
22 Goods were to be transported overland by truck. *Id.* ¶ 3.9.

23 On May 1, 2022, Defendant BNSF’s eastbound train, on which the two trailers were
24 loaded, derailed and caught fire between Minot and Des Lacs, North Dakota. *Id.* ¶ 3.10. All of

1 the Subject Goods were either destroyed by the derailment or caught fire and were destroyed by
 2 the subsequent fire and/or remediation efforts after the derailment. *Id.* ¶ 3.11. The total value of
 3 the goods lost and/or destroyed as a result was \$1,262,898. *Id.* ¶ 3.12.

4 Polaris submitted its claim to Plaintiff, its underwriters, for the total amount of its loss.
 5 *Id.* ¶ 3.13. Plaintiff paid its insured for the total amount and became subrogated to the rights of
 6 Polaris. *Id.* ¶ 3.14.

7 **C. Procedural History**

8 On April 27, 2023, Plaintiff commenced the instant action. Dkt. No. 1. On June 7, 2023,
 9 Plaintiff filed its Amended Complaint. Dkt. No. 6. Relevant to the instant motions, Plaintiff
 10 asserts against Defendant BNSF claims of negligence and breach of contract, as well as
 11 violations of federal statutes and regulations. *Id.* ¶¶ 7.1–7.11. Plaintiff asserts against Defendant
 12 Max Trans a claim of negligence and a violation of a federal statute. *Id.* ¶¶ 5.1–5.6.

13 Defendants BNSF and Max Trans now bring the instant motions to dismiss the claims
 14 against them. Dkt. Nos. 24, 25. Plaintiff opposes both motions. Dkt. Nos. 27, 33. To date, no
 15 other Defendants have filed a motion to dismiss.

16 **II. LEGAL STANDARD**

17 A defendant may seek dismissal when a plaintiff fails to state a claim upon which relief
 18 can be granted. Fed. R. Civ. P. 12(b)(6). In reviewing a FRCP 12(b)(6) motion to dismiss, the
 19 Court takes all well-pleaded factual allegations as true and considers whether the complaint
 20 “state[s] a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678
 21 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). While “[t]hreadbare
 22 recitals of the elements of a cause of action, supported by mere conclusory statements” are
 23 insufficient, a claim has “facial plausibility” when the party seeking relief “pleads factual content
 24 that allows the court to draw the reasonable inference that the defendant is liable for the

1 misconduct alleged.” *Iqbal*, 556 U.S. at 672. “When reviewing a dismissal pursuant to
 2 Rule . . . 12(b)(6), ‘we accept as true all facts alleged in the complaint and construe them in the
 3 light most favorable to plaintiff[], the non-moving party.’” *DaVinci Aircraft, Inc. v. United*
 4 *States*, 926 F.3d 1117, 1122 (9th Cir. 2019) (alteration in original) (quoting *Snyder & Assocs.*
 5 *Acquisitions LLC v. United States*, 859 F.3d 1152, 1156–57 (9th Cir. 2017)).

6 III. DISCUSSION

7 Defendants BNSF and Max Trans make substantially similar arguments.¹ Both argue that
 8 federal law, including the Carmack Amendment to the Interstate Commerce Act and the Carriage
 9 of Goods by Sea Act (“COGSA”), preempt Plaintiff’s common law claims. Dkt. No. 24 at 10–
 10 11; Dkt. No. 25 at 3–5. Defendant BNSF also argues that Plaintiff’s claim for “Violation of
 11 Federal Railroad Safety Regulations” is preempted. Dkt. No. 24 at 11–13. Finally, both
 12 Defendants argue that Plaintiff has not stated a claim for relief, regardless of preemption. *Id.*
 13 at 13–18; Dkt. No. 25 at 5–8. The Court considers each argument in turn.

14 As an initial matter, Plaintiff “offers no argument or authority whatsoever” in defense of
 15 its regulatory claim against Defendant BNSF, “nor does it even respond to BNSF’s related
 16 arguments.” Dkt. No. 30 at 2; *see also* Dkt. No. 27 at 5–6, 8–10. Therefore, as to Plaintiff’s
 17 regulatory claim, Defendant BNSF’s motion to dismiss is GRANTED and the claim is DISMISSED.

18 A. Preemption by Carmack Amendment

19 1. Background

20 “For over one hundred years, the Supreme Court has consistently held that the Carmack
 21 Amendment has completely occupied the field of interstate shipping.” *Certain Underwriters at*
 22 *Interest at Lloyds of London v. United Parcel Serv. of Am., Inc.*, 762 F.3d 332, 335 (3d Cir.
 23

24 ¹ Indeed, Defendant Max Trans incorporates large swaths of Defendant BNSF’s briefing. *See* Dkt. No. 25 at 3, 8.

1 2014) (“*Lloyds*”); *see Adams Express Co. v. Croninger*, 226 U.S. 491, 505–06 (1913) (“Almost
 2 every detail of the subject is covered so completely that there can be no rational doubt but that
 3 Congress intended to take possession of the subject, and supersede all state regulation with
 4 reference to it.”); *N.Y., New Haven & Hartford Ry. Co. v. Nothnagle*, 346 U.S. 128, 131 (1953)
 5 (“Congress superseded diverse state laws with a nationally uniform policy governing interstate
 6 carriers’ liability for property loss.”). “The Courts of Appeals have also unanimously held that
 7 the Carmack Amendment ‘preempts all state or common law remedies available to a shipper
 8 against a carrier for loss or damage to interstate shipments.’” *Lloyds*, 762 F.3d at 336 (quoting *N.
 9 Am. Van Lines, Inc. v. Pinkerton Sec. Sys., Inc.*, 89 F.3d 452, 456 (7th Cir. 1996)); *see also Hall
 10 v. N. Am. Van Lines, Inc.*, 476 F.3d 683, 687–88 (9th Cir. 2007).

11 As the Ninth Circuit has explained, “[t]he Carmack Amendment is a federal statute that
 12 provides the exclusive cause of action for interstate shipping contract claims, and it completely
 13 preempts state law claims alleging delay, loss, failure to deliver and damage to property.” *White
 14 v. Mayflower Transit*, 543 F.3d 581, 584 (9th Cir. 2008); *accord Smallwood v. Allied Van Lines,
 15 Inc.*, 660 F.3d 1115, 1120 (9th Cir. 2011); *Hall*, 476 F.3d at 688. The Carmack Amendment also
 16 “constitutes a complete defense to common law claims against interstate carriers for negligence,
 17 fraud and conversion, even though these claims may not be completely preempted.”² *White*, 543
 18 F.3d at 584 (citing *Hall*, 476 F.3d at 689).

19 **2. Statutory Text**

20 As to rail carriers, the Carmack Amendment states in relevant part:

21 A rail carrier providing transportation or service subject to the
 22 jurisdiction of the [Surface Transportation] Board [“STB”] under

23

 24 ² A claim is completely preempted “to the extent that it arises from the same conduct as the claims for delay, loss or
 damage to shipped property.” *White*, 543 F.3d at 586 (holding claim for intentional infliction of emotional distress
 was completely preempted). Complete preemption is an exception to the “well-pleaded complaint rule” for
 analyzing subject matter jurisdiction. *See Hall*, 476 F.3d at 686–87.

1 this part shall issue a receipt or bill of lading for property it receives
2 for transportation under this part. That rail carrier and any other
3 carrier that delivers the property and is providing transportation or
4 service subject to the jurisdiction of the Board under this part are
5 liable to the person entitled to recover under the receipt or bill of
6 lading.

7 The liability imposed under this subsection is for the actual loss or
8 injury to the property caused by—

9

- 10 (1) the receiving rail carrier;
- 11 (2) the delivering rail carrier; or
- 12 (3) another rail carrier over whose line or route the property is
13 transported in the United States or from a place in the United States
14 to a place in an adjacent foreign country when transported under a
15 through bill of lading.

16 Failure to issue a receipt or bill of lading does not affect the liability
17 of a rail carrier.

18 A delivering rail carrier is deemed to be the rail carrier performing
19 the line-haul transportation nearest the destination but does not
20 include a rail carrier providing only a switching service at the
21 destination.

22 49 U.S.C. § 11706(a).

23 Similarly, as to motor carriers and freight forwarders, the Carmack Amendment states in
24 relevant part:

25 A carrier providing transportation or service subject to jurisdiction
26 under subchapter I [motor carriers] or III [freight forwarders] of
27 chapter 135 shall issue a receipt or bill of lading for property it
28 receives for transportation under this part. That carrier and any other
29 carrier that delivers the property and is providing transportation or
30 service subject to jurisdiction under subchapter I or III of chapter
31 135 or chapter 105 [rail carriers] are liable to the person entitled to
32 recover under the receipt or bill of lading.

33 The liability imposed under this paragraph is for the actual loss or
34 injury to the property caused by

35

- 36 (A) the receiving carrier,
- 37 (B) the delivering carrier, or

1 (C) another carrier over whose line or route the property is
 2 transported in the United States or from a place in the United States
 3 to a place in an adjacent foreign country when transported under a
 4 through bill of lading and, except in the case of a freight forwarder,
 5 applies to property reconsigned or diverted under a tariff under
 6 section 13702.

7 Failure to issue a receipt or bill of lading does not affect the liability
 8 of a carrier.

9 A delivering carrier is deemed to be the carrier performing the line-
 10 haul transportation nearest the destination but does not include a
 11 carrier providing only a switching service at the destination.

12 49 U.S.C. § 14706(a)(1). These provisions are “virtually identical.” *CNA Ins. Co. v. Hyundai*
 13 *Merch. Marine Co.*, 747 F.3d 339, 353 (6th Cir. 2014).

14 Thus, “Carmack applies only to transport of property for which Carmack *requires* a
 15 receiving carrier to issue a bill of lading, regardless of whether that carrier *erroneously fail[ed]*
 16 *to issue* such a bill.” *Smallwood*, 660 F.3d at 1120 n.5 (emphases added) (quoting *Kawasaki*
 17 *Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 561 U.S. 89, 102–03 (2010) (“*Regal-Beloit*”)).

18 Further, a bill of lading is required if two conditions are met. First, the carrier must
 19 “provid[e] transportation or service” subject to certain jurisdiction. 49 U.S.C. §§ 11706(a),
 20 14706(a)(1). Second, the carrier must “receive[]” the property for “transportation under this
 21 part,” where “this part” is the applicable jurisdiction. *Id.* Carmack only requires a receiving
 22 carrier—and not a delivering or connecting carrier—to issue a bill of lading. *Regal-Beloit*, 561
 23 U.S. at 101. As applies here, the STB has jurisdiction over interstate transportation within the
 24 United States. 49 U.S.C. §§ 10501(2)(A) (rail carriers), 13501(1)(A) (motor carriers),
 13531(a)(1) (freight forwarders).

25 //

26 //

27 //

1 3. Application

2 (1) BNSF

3 Plaintiff alleges that Defendant BNSF attempted to transport the Subject Goods from
 4 Washington to Ohio, by rail and while loaded in a TOFC configuration. Dkt. No. 6 ¶¶ 3.7–3.12.
 5 This transportation occurred after Defendants Max Trans and/or Delta “erroneously believed”
 6 the Subject Goods were assigned to rail and loaded them accordingly at Defendant BNSF’s rail
 7 yard—even though the shipper (Polaris) had requested transport overland by truck. *Id.*

8 Plaintiff “agrees . . . in principle” that its common law claims should be dismissed
 9 because they are preempted, “but unless and until this Court holds that the Carmack Amendment
 10 is the law applicable to this case,” Plaintiff pleads its state law claims in the alternative. Dkt.
 11 No. 27 at 6. Plaintiff appears to suggest elsewhere in its brief that the Carmack Amendment may
 12 not apply because the carriage of the Subject Goods was undertaken “by mistake” and that
 13 Plaintiff’s subrogor, Polaris, had not “purposefully availed itself of [Defendant] BNSF’s services
 14 as a carrier.” *Id.* at 10.

15 The Court finds that the Carmack Amendment applies to this case and preempts
 16 Plaintiff’s common law claims. Plaintiff alleges that Defendant Expeditors issued two sea
 17 waybills for overseas transportation from various locations to Seattle and Tacoma, Washington.³
 18 Dkt. No. 6 ¶ 3.3. Defendant Expeditors, a freight forwarder, then issued two “bookings”⁴ for
 19 overland transportation from Washington to Ohio, and it hired Defendant Max Trans, a motor
 20 truck carrier, to pick up the Subject Goods in Seattle and transport them to Ohio. *Id.* ¶¶ 3.6–3.7.

21

 22 ³ Plaintiff attaches to its response the sea waybills issued by Defendant Expeditors. *See* Dkt. No. 28-1. While the
 23 Court may not consider this material in a motion to dismiss, the waybills are bills of lading and do state that the
 24 overseas leg of the shipment was to end in Washington. *Id.*

⁴ Plaintiff did not attach a copy of these “bookings” to the Complaint. Thus, it is unclear whether these “bookings”
 are bills of lading or what their terms might be. Plaintiff can certainly plead these allegations with more clarity if it
 files an amended complaint.

1 Defendant Max Trans picked up the Subject Goods and moved them to a container yard. *Id.*
 2 ¶ 3.7. Defendant Max Trans further subcontracted some or all of the interstate carriage to
 3 Defendant Delta. *Id.* The overland transportation was ultimately performed by Defendant BNSF,
 4 which carried the Subject Goods eastbound by rail.⁵ *Id.* ¶ 3.8, 3.10. Under these circumstances,
 5 one of the receiving entities at the point of origin—be it freight forwarder Defendant Expeditors
 6 or motor carrier Defendant Max Trans—was required to issue a separate Carmack-compliant bill
 7 of lading. 49 U.S.C. § 14706(a)(1).⁶

8 Plaintiff notes that there is no evidence or allegation that Defendant BNSF issued a bill of
 9 lading. Dkt. No. 27 at 6. While there is no evidence or allegation at this stage that *any* carrier
 10 issued a bill of lading, it does not matter: “The decisive question is not whether the [] carrier in
 11 fact issued a Carmack bill but rather whether the carrier was required to issue a bill by
 12 Carmack’s first sentence.” *Regal-Beloit*, 561 U.S. at 103. As one of the Defendants was required
 13 to issue such a bill (even if a bill was never actually issued), the Carmack Amendment applies
 14 and “completely preempts” Plaintiff’s claims of negligence and breach of contract, which stem
 15 entirely from alleged damage to the Subject Goods. *White*, 543 F.3d at 584; *see also, e.g.*, *BNSF*
 16 *Logistics, LLC v. L&N Express, Inc.*, No. C11-5810, 2012 WL 525526, at *4–5 (N.D. Cal. Feb. 16,
 17 2012) (holding breach of contract and negligence claims preempted by Carmack Amendment).

18

19 ⁵ Defendant BNSF suggests that the transportation may be “exempt” pursuant to 49 U.S.C. § 10502. *See* Dkt. No. 24
 20 at 11 n.1; *see also* 49 C.F.R. § 1092 (rail and highway TOFC service exempt). This exemption permits carriers to
 21 offer shippers alternative terms to Carmack liability. *See Nippon Yusen Kaisha v. Burlington & N. Santa Fe Ry. Co.*,
 22 367 F. Supp. 2d 1292, 1300 (C.D. Cal. 2005). Here, there is no allegation that *any* carrier offered alternative terms.
 23 Even if they did, however, “the shipper[] sues the carrier under the Carmack Amendment, rather than under a state-
 24 law breach of contract or negligence claim; the carrier may plead as an affirmative defense that a limitation of
 liability applies.” *Schoenmann Produce Co. v. Burlington & N. Santa Fe Ry. Co.*, 420 F. Supp. 2d 757, 762 (S.D.
 Tex. 2006) (citing *Tokio Marine & Fire Ins. Co., Ltd. v. Amato Motors, Inc.*, 996 F.2d 874, 878 (7th Cir. 1993); then
 citing, *inter alia*, *Nippon Yusen Kaisha*, 367 F. Supp. 2d 1292).

6 Plaintiff does not allege whether Defendant BNSF or Defendant Max Trans is a “receiving carrier,” a “delivering
 carrier,” or a “connecting carrier” under Carmack, nor do the Parties address these categories in their briefing. *See*
Regal-Beloit, 561 U.S. at 100. Regardless, the Court finds that Carmack applies to the shipment in this case.

1 Plaintiff's other arguments are also unavailing. In its request for leave to amend, Plaintiff
2 appears to suggest (without authority) that because transportation by Defendant BNSF was
3 "likely . . . by mistake," the Carmack Amendment does not apply. Dkt. No. 27 at 10. However,
4 there is no requirement in the text of Carmack that a carrier be specifically and intentionally
5 selected for Carmack to apply. Indeed, the purpose of the Carmack Amendment is "to relieve
6 cargo owners 'of the burden of searching out a particular negligent carrier from among the often
7 numerous carriers handling an interstate shipment of goods.'" *Regal-Beloit*, 561 U.S. at 98
8 (quoting *Reider v. Thompson*, 339 U.S. 113, 119 (1950)). Plaintiff itself pleads in the alternative
9 that Defendant BNSF "entered an implied and express contract with Polaris" to carry the Subject
10 Goods, suggesting that regardless of the parties' intentions, Defendant BNSF entered some kind
11 of contract for transportation of the Subject Goods. Dkt. No. 6 ¶ 7.4. Finally, the Ninth Circuit's
12 decision in *Smallwood* strongly suggests that a mistake in effectuating the shipper's instructions
13 (here, carriage by rail instead of by motor) does not negate the application of Carmack. 660 F.3d
14 at 1120 n.5 (finding Carmack "plainly governs" the shipment, even though carrier shipped goods
15 abroad instead of storing them as instructed).

16 Relatedly, also in its request for leave to amend, Plaintiff appears to suggest (without
17 authority) that because neither Polaris nor any of its agents "appears to have purposefully availed
18 itself" of Defendant BNSF's carrier services, the Carmack Amendment may not apply. Dkt.
19 No. 27 at 10. But under Carmack, "[f]or the purposes of Fixing the liability, the several carriers
20 must be treated, not as independent contracting parties, but as one system." *Mo., Kan. & Tex. Ry. Co. of Tex. v. Ward*, 244 U.S. 383, 387–88 (1917); *see also CNA Ins. Co.*, 747 F.3d at 356
21 (observing that in *Ward*, the Supreme Court "allowed the shipper to sue and recover from
22 subsequent rail carriers, despite the absence of contractual privity between the shipper and those
23 carriers"). Thus, it is irrelevant that Polaris did not contract with Defendant BNSF specifically.

1 What matters is that Defendant BNSF was part of the chain of carriers engaged to transport the
2 Subject Goods.

3 Therefore, as to Plaintiff's common law claims, Defendant BNSF's motion to dismiss is
4 GRANTED and the claims are DISMISSED without leave to amend, as amendment would be futile.

5 (2) Max Trans

6 Plaintiff "agrees that [Defendant] BNSF and [Defendant] Max Trans are, at this early
7 juncture, in substantially similar positions in relation to this destroyed cargo." Dkt. No. 33 at 2.
8 Plaintiff also again "agrees, in principle," that the Carmack Amendment preempts state law
9 claims, but notes that the Court must first rule that Carmack applies. *Id.* at 3.

10 As to Defendant Max Trans, Plaintiff presents no questions of mistake or purposeful
11 availment; on the contrary, Plaintiff alleges that Defendant Expeditors explicitly hired Defendant
12 Max Trans as a motor truck carrier to carry the Subject Goods to Ohio. Dkt. No. 6 ¶ 3.7. Plaintiff
13 makes no distinct argument against application of the Carmack Amendment to claims against
14 Defendant Max Trans. Moreover, the Court has found that the Carmack Amendment applies to
15 this case. *See supra* Section III.A.3.1.

16 Therefore, as to Plaintiff's common law claims, Defendant Max Trans's motion to
17 dismiss is GRANTED and the claims are DISMISSED without leave to amend, as amendment would
18 be futile.⁷

19 **B. Failure to State a Claim**

20 "A shipper . . . establishes a *prima facie* case of a carrier's liability under the Carmack
21 Amendment by establishing by a preponderance of the evidence that the goods were:
22 (1) delivered to the carrier in good condition; (2) the goods were damaged or lost while in the

23
24 ⁷ Because the Court finds that the Carmack Amendment preempts all common law claims, the Court need not reach
Defendants' arguments related to COGSA.

1 carrier's possession; and (3) damages." *ASARCO LLC v. England Logistics, Inc.*, 71 F. Supp. 3d
 2 990, 994 (D. Ariz. 2014) (citing *Mo. Pac. R.R. Co. v. Elmore & Stahl*, 377 U.S. 134, 138
 3 (1964)); *accord CNA Ins. Co.*, 747 F.3d at 353.

4 Defendants BNSF and Max Trans both argue that Plaintiff's claim under the Carmack
 5 Amendment is not plausibly alleged because Plaintiff has not alleged the condition of the goods
 6 when provided to them. Dkt. No. 24 at 18; Dkt. No. 25 at 8. In addition, Defendant BNSF argues
 7 in one sentence that Plaintiff does not allege that it satisfied "claim submission requirements"
 8 prior to suit (Dkt. No. 24 at 18), and Defendant Max Trans argues that Plaintiff "fail[s] to
 9 definitively allege that Max Trans actually took possession or, in the alternative, subcontracted to
 10 Delta to take possession" prior to loading (Dkt. No. 25 at 8). Plaintiff responds that "it is legally
 11 inferred in federal cargo litigation that the cargo was in good order when it is destroyed in
 12 transit." Dkt. No. 27 at 9; *accord* Dkt. No. 33 at 4. Plaintiff also points out that Defendant BNSF
 13 does not specify the alleged claim requirements. Dkt. No. 27 at 10.

14 The Court agrees that Plaintiff has failed to sufficiently allege the condition of the
 15 Subject Goods. Indeed, Plaintiff makes no allegation as to the condition of the Subject Goods at
 16 any stage of transport, save their ultimate destruction in the derailment. Dkt. No. 6 ¶ 3.11.
 17 However, as Plaintiff notes, this deficiency is "clearly curable by amended allegations." Dkt.
 18 No. 27 at 11. Therefore, as to Plaintiff's Carmack claims, Defendants' motions are GRANTED,
 19 and the claims are DISMISSED with leave to amend.

20 Defendants' other arguments are unavailing. First, Defendant BNSF's argument about
 21 "claim submission requirements" appears to refer to certain regulations setting out "the minimum
 22 requirements of a written notice under the UBL [Uniform Bill of Lading]." *N.Y. Marine & Gen.*
 23 *Ins. Co. v. Estes Express Lines, Inc.*, No. C15-2962, 2016 WL 11778406, at *4 (S.D. Cal. Oct.
 24 25, 2016), *aff'd*, 719 F. App'x 691 (9th Cir. 2018); *see* 49 U.S.C. § 14706(e)(1); 49 U.S.C.

1 § 11706(e); 49 C.F.R. § 370.3(b); 49 C.F.R. § 1005.2(b); *see also S&H Hardware & Supply Co.*
 2 *v. Yellow Transp., Inc.*, 432 F.3d 550, 554 (3d Cir. 2005) (“Under the implementing regulations
 3 of the Carmack Amendment, a claim must file notice of loss or damage with the carrier *within*
 4 *the time specified on the bill of lading . . .*” (emphasis added)). The Ninth Circuit has held that
 5 these notice requirements apply to both contested and uncontested claims, but it did so in a case
 6 where a bill of lading was issued and included a written notice requirement. *See Ins. Co. of N.*
 7 *Am. v. G.I. Trucking Co.*, 1 F.3d 903, 906 (9th Cir. 1993); *see also id.* at 905 (stating that the
 8 regulations “outline the minimum requirements of a written notice claim under the UBL”).

9 Notably, Defendant BNSF supplies no authority that these regulations create a free-
 10 standing notice requirement in a case like this one, where Plaintiff does not allege that a bill of
 11 lading was issued. Thus, “[e]ven if notice ultimately is required in a contested case such as this,
 12 [Defendant BNSF] has provided no authority that a plaintiff must affirmatively plead compliance
 13 with the notice of claim procedure when pleading a claim pursuant to the Carmack Amendment,
 14 particularly where, as here, [Plaintiff has] not alleged that [it was] provided a bill of lading or
 15 contract setting forth the notice requirements.” *Swenson v. All. Moving & Storage LLC*, No. C21-
 16 1968, 2022 WL 1508506, at *12 (D. Colo. Apr. 26, 2022), *report and recommendation adopted*,
 17 2022 WL 1500778 (D. Colo. May 12, 2022).

18 Defendant BNSF believes “[i]t is at least suggested” by the Amended Complaint “that
 19 [Defendant] Expeditors did issue a bill of lading or other receipt for the freight in this case.” Dkt.
 20 No. 30 at 6. But a bill of lading is not alleged, nor is one presented to the Court. If Defendant
 21 BNSF has a good-faith basis for believing or discovery reveals that a bill of lading was issued
 22 and included notice requirements, or if it knows it issued such a bill, Defendant BNSF may be
 23 able to assert lack of compliance as a defense. *See, e.g., Estes Express Lines*, 2016 WL
 24 11778406, at *7 (granting summary judgment where bill of lading required written notice of

1 claim, but notice did not meet regulatory requirements). But at this stage, based on the facts
2 alleged, Plaintiff does not need to plead compliance with such requirements.

3 Second, Defendant Max Trans's argument that the allegations do not sufficiently allege
4 its possession of the Subject Goods is meritless. Plaintiff plainly alleges that after Defendant
5 Max Trans was hired by Defendant Expeditors, "Max Trans picked up the two trailers
6 [containing the Subject Goods] at Seattle and took them to a container yard." Dkt. No. 6 ¶ 3.7.
7 From there, "Max Trans further subcontracted some or all of the interstate motor truck carriage
8 to Delta." *Id.* These allegations are sufficient to establish possession by Defendant Max Trans.

9 **IV. CONCLUSION**

10 Accordingly, it is hereby ORDERED:

11 (1) Defendant BNSF's motion to dismiss (Dkt. No. 24) is GRANTED.
12 (2) Defendant Max Trans's motion to dismiss (Dkt. No. 25) is GRANTED.
13 (3) Plaintiff is GRANTED leave to amend its claims under the Carmack Amendment.
14 Should Plaintiff choose to amend, the amended complaint SHALL be filed **within**
15 **thirty (30) days** of this Order.

16 Dated this 31st day of January 2024.

17 
18 _____
19 Tana Lin
20 United States District Judge
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